Simetech (M) Sdn Bhd v Yeoh Cheng Liam Construction Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO 24-149-87
LIM BENG CHOON J
18 OCTOBER 1991

Civil Procedure *— Statement of claim — Amendment — Amended to increase amount claimed — Consented to by both parties — Whether plaintiff had cause of action in respect of additional sum at the time when the writ was issued*

Civil Procedure *— Cause of action — Amendment to writ to claim additional sum — Whether plaintiff entitled to additional sum when writ was issued*

Civil Procedure *— Summary judgment — Whether plaintiff entitled to claim sum originally claimed — Triable issues — Rules of the High Court 1980 O 14*

Civil Procedure *— Amendment — Additional sum claimed on amendment of writ and statement of claim — Amendment dates back to date of writ — No cause of action in respect of additional sum at date of issue of writ — Whether claim valid*

The defendant was the main contractor for the construction of an office building for Kian Min Realty Sdn Bhd ('the project'). Pursuant to an agreement dated 6 November 1984 the plaintiff agreed to execute the sub-contract works ('the sub-contract'), viz the supply and installation of air-conditioning and ventilation system for a consideration of $1,288,000 or such other sums as would be due under the sub-contract. The plaintiff asserted that it had since completed the said works satisfactorily but the defendant had failed to pay the plaintiff the outstanding amount of $48,618.40 being the amount due to the plaintiff under the sub-contract. It instituted an action against the defendant claiming that sum. Before the defendant had filed in its defence, the plaintiff amended its statement of claim increasing the amount claimed to $222, 277.65. Thereafter, the plaintiff applied for summary judgment against the defendant for the sum of $222,277.65 with interest and costs. The plaintiff based this additional sum on the final adjusted contract sum as stated by the consulting engineer in the statement of final account dated 10 November 1986. The defendant, via affidavit evidence, disputed this sum, and submitted the last architect's payment certificate issued before the statement of claim was filed on 18 February 1987. Subsequently, the plaintiff, via affidavit evidence, produced copies of the architects's certificates of payments, both of which were issued after the statement of claim was filed. Both certificates certified a further gross total sum of $1,173,459.25. Thereafter the plaintiff applied on 1 November 1988 to amend its statement of claim one more time. By consent, the amendments were allowed resulting in the plaintiff's claim being increased to $222,277.65. On 24 July 1989, the plaintiff's application was heard and the senior assistant registrar held in favour of the plaintiff. The defendant appealed.

Held, allowing the defendant's appeal: A

(1) As the amendment related back to the date of the original pleading, no new cause of action accruing since the original pleading would be allowed. Applying this principle, the plaintiff is not entitled to claim the additional sum of $173,659.25 which became due and payable to the plaintiff only after the date of the issue of the writ and statement of claim. B

(2) Under the sub-contract, the right of the defendant to claim for loss and expense caused by the plaintiff was reserved. The right of a main contractor to withhold a certain sum to satisfy the main contractor's claim against the sub-contractor is also acknowledged under the common law. The defendant had succeeded in C raising triable issues which cannot be resolved at the O 14 judgment stage but only at the trial of this action.

[Bahasa Malaysia summary

Defendan adalah kontrator utama bagi pembinaan satu bangunan D pejabat untuk Kian Min Realty Sdn Bhd ('projek itu'). Menurut satu persetujuan bertarikh 6 November 1984, plaintif bersetuju melaksanakan kerja kontrak kecil ('kontrak kecil itu'), iaitu pembekalan dan pemasangan sistem penyaman udara dan peredaran udara untuk balasan $1,288,000 atau jumlah lain yang wajib dibayar mengikut kontrak kecil itu. Plaintif mendakwa bahawa ia telah menghabiskan E kerja itu dengan sempurna tetapi defendan gagal membayarnya baki jumlah $48,618.40, iaitu jumlah yang wajib dibayar kepada plaintif di bawah kontrak kecil itu. Plaintif telah mengambil tindakan terhadap defendan untuk menuntut jumlah itu. Sebelum defendan memfail pembelaannya, plaintif meminda penyata tuntutannya untuk F menaikkan jumlah yang dituntut kepada $222,277.65. Selepas itu, plaintif memohon untuk penghakiman terus terhadap defendan untuk jumlah $222,277.65 bersama faedah dan kos. Plaintif telah mendasarkan jumlah ini mengikut jumlah kontrak diselaraskan akhir seperti yang dinyatakan oleh jurutera perunding di dalam penyata akaun akhir bertarikh 10 November 1986. Defendan, melalui ke- G terangan afidavit, mempertikaikan jumlah ini, dan mengemukakan sijil pembayaran arkitek yang terakhir yang dikeluarkan sebelum penyata tuntutan difail pada 19 Februari 1987. Kemudiannya, plaintif, melalui keterangan afidavit, mengemukakan salinan sijil pembayaran arkitek, kedua-duanya dikeluarkan selepas penyata tuntutan difailkan. H Kedua-kedua sijil itu mengesahkan satu jumlah kasar tambahan sebanyak $1,173,459.25. Selepas itu, plaintif memohon meminda penyata tuntutannya sekali lagi pada 1 November 1988. Mengikut persetujuan, pindaan-pindaan itu dibenarkan dan ini berkesudahan dengan tuntutan plaintif dinaikkan ke $222,277.65. Pada 24 Julai 1989, permohonan plaintif dibicarakan dan penolong kanan pendaftar I memberi penghakiman kepada plaintif. Defendan telah merayu.

Diputuskan, meluluskan rayuan defendan itu:

(1) Oleh kerana pindaan itu berhubung balik (related back) kepada tarikh pliding asal, tiada kausa tindakan yang baru yang terakru

semenjak pliding asal itu akan dibenarkan. Menggunakan prinsip ini, plaintif tidak berhak menuntut jumlah tambahan sebanyak $173,659.25 yang menjadi wajib dibayar kepada plaintif cuma selepas tarikh pengeluaran writ dan penyata tuntutan.

(2) Di bawah kontrak kecil itu, hak defendan untuk menuntut kerugian dan perbelanjaan yang diakibatkan oleh plaintif dirizabkan. Hak kontraktor utama untuk memegang balik satu jumlah yang tertentu untuk memenuhi tuntutan kontraktor utama terhadap kontraktor kecil juga diiktiraf di bawah common law. Defendan telah berjaya membangkitkan isu-isu yang boleh dibicarakan yang tidak boleh diselesaikan di peringkat penghakiman A 14 tetapi cuma di perbicaraan tindakan ini.]

Notes

For cases on addition of new cause of action on amendment, see 2 *Mallal's Digest* (4th Ed) paras 131-134.

For cases on triable issues raised in application for summary judgment, see 2 *Mallal's Digest* (4th Ed) paras 2287-2296.

Cases referred to

1 *Eshelby v Federated European Bank Ltd (1)* [1932] 1 KB 254 (folld)
2 *Tilcon Ltd v Land & Real Estate Investments* [1987] 1 All ER 615 (refd)
3 *Sio Koon Lin & Anor v SB Mehra* [1981] 1 MLJ 225 (folld)
4 *Zea Star Shipping Co v Parley Augustsson* [1984] 2 Lloyd's Rep 605 (not folld)
5 *Tottenham Local Board of Health v Lea Conservancy Board* (1886) 2 TLR 410 (refd)
6 *Gilbert-Ash (Northern) v Modern Engineering* [1973] 3 All 195 (refd)

J Karnaperan (*Shearn Delamore & Co*) for the plaintiff.
CS Loy (*Nahappan Dorairaj & Danker*) for the defendant.

Cur Adv Vult

Lim Beng Choon J: On 18 February 1987 the plaintiff instituted this action against the defendant claiming a sum of $48,618.40. The plaintiff alleged in the statement of claim endorsed in its writ that the defendant was the main contractor for the construction of an office building for Kian Min Realty Sdn Bhd ('the project'). Pursuant to an agreement dated 6 November 1984 the plaintiff agreed to execute the sub-contract works ('the sub-contract'), viz the supply and installation of air-conditioning and ventilation system for a consideration of $1,288,000 or such other sums as would be due under the sub-contract. The plaintiff asserted that it had since completed the said works satisfactorily but the defendant had failed to pay the plaintiff the outstanding amount of $48,618.40 being the amount due to the plaintiff under the sub-contract. The plaintiff gave the following particulars to show the amount due to it:

Amount certified for payment		$ 1,273,000
Less:		
Retention sum	$ 32,200	
Payments of	$1,187,937.30	
Agreed debit notes	$ 4,244.30	
Sub-total		$1,192,181.60
Amount due		$ 48,618.60

The plaintiff went on to allege that despite repeated demands the defendant had failed refused and/or neglected to pay the sum claimed. The plaintiff therefore prayed for judgment (a) in the sum of $48,618.40, (b) interest on the sum claimed at 12% pa from 31 March 1986; and (c) costs.

The defendant entered appearance on 11 March 1987 but before the defendant had filed in its statement of defence the plaintiff amended its statement of claim on 15 July 1987 pursuant to O 20 r 3(1) of the Rules of the High Court 1980 ('RHC'). The amendment related to the particulars showing the amount due to the plaintiff which after the amendment now reads:

Amount certified for payment		$1,414,459.25
Less:		
Payments of	$1,187,937.30	
Agreed debit notes	$ 4,244.30	
Sub-total		$1,192,181.60
Amount due		$ 222,277.65

Thereafter the plaintiff filed a summons-in-chambers dated 14 July 1987 which was received and registered by the court on 16 July 1987 by which it applied for an order pursuant to O 14 of the RHC to enter final judgment against the defendant for the sum of $222,277.65 with interest and costs. The application was supported by an affidavit affirmed by Ng Mong Eng ('Ng'), the general manager of the plaintiff, on 14 July 1987 in which the defendant asserted that the plaintiff was duly and justly indebted to the plaintiff in the sum of $222,277.65 and interest and costs. Ng produced a copy of the sub-contract which he marked as exh 'NME1' in his affidavit. He further asserted that the defendant had satisfactorily completed its sub-contract works and all items on the defect list had been satisfactorily cleared as could be evidenced by the letter dated 20 March 1987 from Juaraconsult Sdn Bhd who were the consulting engineers to the project. A copy of the said letter was produced by Ng and marked as exh 'NME2' in his affidavit. The statement of the final account had also been finalized, as evidenced by the document dated 10 November 1986 a copy of which was annexed as exh 'NME3' in his affidavit. It is appropriate at this juncture to reproduce so much of the contents of the said exhs 'NME1', 'NME2' and 'NME3' as are relevant in my consideration of the issue that was raised before me at the hearing of the appeal lodged by the defendant (encl 15).

The clauses in the sub-contract exh 'NME2' that are relevant to the issue raised at the hearing of the defendant's appeal are as follows:

11(b) Within 14 days of the receipt by the contractor of any certificate or duplicate copy thereof from the architect the contractor shall notify and pay to the sub-contractor the total value certified therein in respect of the sub-contract works and in respect of any authorized variations thereof or in respect of any amounts ascertained under cl 8(c) thereof less —

(i) Retention money, that is to say the proportion attributable to the sub-contract works of the amount retained by the employer in accordance with the main contract; and
(ii) The amount previously paid.

(g) If before the issue of a final certificate under the main contract the architect desires to secure final payment to the sub-contractor on completion of the sub-contract works and in accordance with and subject to the provisions of the main contract relating to prime cost sums issues a certificate to the contractor including an amount to cover such final payment, then the contractor shall pay to the sub-contractor the amount so certified by the architect as aforesaid; but such payment shall only be made if the sub-contractor indemnifies and secures the contractor to the reasonable satisfaction of the contractor against all latent defects in the sub-contract works and if by such final payment the contractor will be discharged under the main contract from all liabilities in respect of the sub-contract works except for latent defects.

The certificate of the consulting engineer dated 20 March 1987 exh 'NME2' started off with a statement that a final inspection of the M & E works made under the scope of contract, ie (1) LT electrical installation; (2) air-conditioning and ventilation installation; (3) fire fighting services and PA system installation; (4) lifts installation; and (5) plumbing and sanitary installation had been carried out on 18 March 1987 in the presence of certain representatives of all parties concerned and the certificate went on to say:

> All the items on the defect list for inspection on abovementioned M & E services, carried out on 4, 5 and 6 February 1986 at the handover of the building have now been satisfactorily cleared.

Exhibit 'NME2' was sent to the architect of the project with copies to the plaintiff and the defendant. Exhibit 'NME3' was issued by the consulting engineer on *10 November 1986* and the relevant part of the statement reads as follows:

> Statement of Final Account
>
> Airconditioning & Ventilation Installation
> Sub-Contractor: M/s Simetech (Malaysia) Sdn Bhd
> Awarded Contract Sum: $1,288,000

The consulting engineer then proceeded with the deduction of the total costs of omitted sub-contract works and to add in the costs of additional sub-contract work with the following result: 'Final adjusted contract sum: $1,414,459.25.'

The final adjustment was followed by the following statement: 'We confirm the above record is correct and there will be no further claim of the variation work.'

The statement was confirmed by the authorized representative of the plaintiff who signed in the space provided and endorsed with the plaintiff company's chop. It was signed on 30 October 1986. Exhibit 'NME3' was sent to the architect of the project with copies to the plaintiff and the defendant.

The plaintiff based its claim for summary judgment on these three documents. As the final adjusted contract sum came to $1,414,459.25 and as the defendant had only made progressive payments and payments by debit notes amounting to $1,192,181.60, the plaintiff therefore wanted summary judgment for the balance sum of $222,277.65 with interest and costs.

The defendant through its contracts manager, Edward Lee Hock Soon, filed in an affidavit affirmed by Edward Lee on 5 October 1987 in which it was asserted that the last certificate issued by the architect to the defendant prior to the date of the filing of the statement of claim by the plaintiff was dated 11 March 1987 which was progress payment No 21. He produced the said certificate comprising seven separate statements of accounts of all the sub-contractors including the defendant which Edward Lee marked as exhs 'LHS 1A' to 'LHS 1G'. From exh 'LHS 1G' it was clearly shown, so asserted Edward Lee, that he certified that the gross figure in the certificate was $1,273,000, less the retention sum of $32,200 the net amount certified was $1,240,800. As the plaintiff had acknowledged receipt of the sum of $1,187,937.30 and had further agreed to debit notes amounting to $4,244.30, the amount in dispute was only $48,618.40. Edward Lee went on to allege that the plaintiff was not even entitled to that sum for there were two debit notes dated 24 June 1985 and 23 August 1985 amounting to a sum of M$2,500 each being reimbursement cost of usage of the defendant's passenger hoist. There was a further debit note dated 31 March 1986 amounting to $43,618.40 being reimbursement for loss and expense due to delay caused by the defendant from 25 August 1985 to 29 January 1986.

Approximately nine months after Edward Lee had affirmed the aforesaid affidavit, one Robert Lazar of the firm of Shearn Delamore & Co and Drew & Napier, solicitors of the plaintiff, affirmed an affidavit on 16 July 1988 in which he produced copies of the architect's certificate No M60/ST10 dated 20 July 1987 ('certificate ST10') and certificate No M60/ST11 dated 8 September 1987 ('certificate ST11'). Presumably Robert Lazar was given these two certificates by the plaintiff on or about the date he affirmed his affidavit. The two certificates were produced and annexed in exh 'RL-1' to the affidavit. Certificate ST10 certified a further gross sum of $141,459.25 while certificate ST11 certified a further gross sum of $32,000 due to the plaintiff. Upon filing the two certificates, the plaintiff thereafter applied on 1 November 1988 to amend its statement of claim one more time. By consent the amendments were allowed resulting in the claim of the plaintiff being increased to $222,277.65, particulars of which as stated in its re-amended statement of claim are as follows:

Amount previously certified for payment	$	1,273,000
Less retention sum	$	32,200
	$	1,240,800

Amount due under certificate No 60/ST/10	$ 141,459.25		
Amount due under certificate No 60/ST/11	$ 32,200		
Sub-total			$ 173,659.25
			$1,414,459.25
Less:			
Payments of	$1,187,937.30		
Agreed debit note	$ 4,244.30		
Sub-total			$1,192,181.60
Amount due			$ 222,277.65

The plaintiff averred that certificates ST10 and ST11 were matters arising since the issue of the writ.

Thereafter Edward Lee affirmed a further affidavit on 10 January 1989 in which he produced a debit note for the sum of $28,624 being interest on retention fund incurred due to delay by the plaintiff in making good its defect in works from 29 January 1987 to 29 July 1987. He also alleged that the defendant was entitled to withhold a sum of $125,029.28 in respect of power consumed by the plaintiff.

In response to the allegations of the defendant made in the two affidavits of Edward Lee, the plaintiff through its general manager, Ng Mong Eng, affirmed another affidavit on 21 June 1989 in which it was asserted, inter alia, that the plaintiff had at all times acted expeditiously and was instead often hampered in its progress of the installation and commissioning of the air-conditioning because of the defendant and other sub-contractors. Therefore the defendant was not entitled to refuse to return the retention sum of $32,000 that was due to the plaintiff or to charge the plaintiff a sum of $43,618.40 purportedly to be reimbursed for loss and expense due to delay caused by the plaintiff from 28 August 1985 to 29 January 1986. It was also asserted that the defendant's claim for the further sum in respect of the alleged plaintiff's consumption of power was arbitrarily raised by the defendant to avoid liability.

The application of the plaintiff for summary judgment pursuant to O 14 of the RHC was heard by the senior assistant registrar on 24 July 1989 who delivered her decision on 7 August 1989 in favour of the plaintiff, directing the defendant to pay to the plaintiff the sum of $222,277.65 together with interest thereon at 12% pa from 31 March 1986 to date of realization and costs of $350. Thereafter the defendant filed its notice of appeal to the judge-in-chambers dated 9 August 1989 appealing against the decision of the senior assistant registrar.

It is commonplace that on 18 February 1987 when the plaintiff instituted the present action it was claiming for a sum of $48,618.40 being the amount certified by the architect prior to that date. However, subsequently, as stated earlier, the architect issued two certificates of payment No 60/ST/10 and 11 certifying that a further sum of $17,3659.25 was due to the plaintiff. It is also commonplace that the defendant would be bound to make payments to the plaintiff within 14 days after receipt of any certifi-

cates issued by the architect certifying that such payments were due and payable to the defendant. Bearing in mind the general principle that any subsequent amendments to the writ and statement of claim would relate back to or speak from the original date when such writ and statement of claim were filled, the issue raised by counsel for the defendant is whether the plaintiff could claim for the additional sum of $173,659.25 when at the time when the plaintiff's writ and statement of claim were filed on 18 February 1987 the architect had not yet issued the two certificates of payment Nos ST/10 and ST/11. Counsel for the defendant submitted that the plaintiff was not entitled to claim the additional sum notwithstanding that the writ and statement of claim were amended because as at 18 February 1987 the architect had not yet issued the two certificates of payment Nos ST10 and ST11. The plaintiff should institute a separate action to claim for the additional sum since the claim for the additional sum was a new cause of action based on the said two certificates issued subsequent to 18 February 1987 which the defendant was not contractually bound to pay at the time when the present action was instituted. Another issue raised by counsel for the defendant was that the senior assistant registrar was wrong in directing the defendant to pay interest at 12% pa as from 31 March 1986 as there was no provision under the sub-contract requiring the defendant to pay interest for late payment in respect of any interim progress payment.

Counsel for the plaintiff, on the other hand, submitted that the plaintiff was entitled to claim for the additional sum since the said certificates were merely certifying payments for works which had been completed as early as 10 November 1986. In any case the plaintiff had a cause of action in its claim for $48,618 and any subsequent increment to that sum could be duly inserted in the writ and statement of claim by amendment of the same. As to the question of interest counsel conceded that the senior assistant registrar was wrong in allowing the 12% pa interest effective from 31 March 1986. However counsel then argued that pursuant to s 11 of the Civil Law Act 1956 the court could give interest from the date when the cause of action accrued until the date of judgment.

It is to be noted that the amendments made by the plaintiff to its statement of claim were made by consent of the parties. However that may be, it does not inhibit the defendant from raising the issue that notwithstanding the amendments the plaintiff had no right to claim for the additional sum of $173,659.25 for the above-mentioned reasons given by counsel for the defendant. It is an accepted rule of law that where the amendment will still leave the plaintiff without any title to sue *at the date of the writ*, the amendment would be worthless. Pursuant to this rule, counsel for the defendant has every right to raise the first issue, namely, whether, notwithstanding the amendment, the plaintiff was entitled to claim for the additional sum when at the date of the issue of the writ the plaintiff was not entitled to such claim. Putting it another way had the plaintiff a cause of action in respect of the additional sum at the time when the writ was issued?

In considering the first issue, I would refer to the English *Supreme Court Practice 1985* (Vol 1) para 20/5-8/2 pp 338-339. There it is set out that:

> An amendment duly made ... takes effect *not* from the date when the amendment is made but from the date of the *original* document which it amends ...

> Thus when an amendment is made to the writ, the amendment dates back to the date of the original issue of the writ and the action continues on though the amendment *had been inserted from the beginning.* The writ as amended becomes *the origin of the action* and the claim thereon indorsed is *substituted* for the claim originally indorsed. (Emphasis supplied.)

The aforesaid proposition finds support in a number of English judgments. Thus in *Eshelby v Federated European Bank Ltd (1)*[1] the plaintiff there issued his writ claiming payment of one instalment of money under a particular contract. After the issue of the writ, the defendant defaulted in paying a further instalment under the same contract. The plaintiff sought to amend his pleading to claim in the same action the second instalment also. It was held that he could not do so. The non-payment of the second instalment was a separate cause of action which did not exist at the time when the writ was issued and would therefore have to be claimed in a separate action. Another interesting case is *Tilcon Ltd v Land & Real Estate Investments.*[2] There the plaintiffs entered into a 15-year contract with the defendants for the supply of a stipulated annual quota of clay suitable for the manufacture of facing bricks. The plaintiff rejected the first delivery of clay asserting that it did not satisfy the contractual requirements on the quality and they issued a writ seeking a declaration that they were only required to accept clay of a particular quality. The defendants counter-claimed for the amount agreed to be paid under the contract for the first delivery. Subsequently the defendants applied to amend their counter-claim to plead that the plaintiff had repudiated the contract by their wrongful refusal to accept the first delivery and that the defendants had accepted the repudiation and claimed not only for the amount due under the first delivery but also for loss and damage in that they had been deprived of the opportunity of profiting from the sales of the said clay. The Court of Appeal accepted the principle that as an amendment related back to the date of the original pleading no new cause of action accruing since the original pleading would be allowed. Accordingly an amendment to a counter-claim adding a new cause of action accruing since the date of the counter-claim would not be permitted. However that may be, the Court of Appeal gave judgment in favour of the defendant on the ground that the assertion that the plaintiffs had repudiated the contract was *not a new cause of action* since the facts giving rise to the claim had occurred before the issue of the counter-claim. Furthermore the defendants' election to treat the contract as being repudiated was a result of those facts and went to the issue of remedy rather than constituting a fresh act necessary to complete a new cause of action. Our then Federal Court adopted a similar approach as enunciated in the *Eshelby* case[1] regarding the question of the non-existence of certain facts at the date of the issue of a writ which could not form part in the cause of action relied on by the plaintiff in his pleadings. Thus in the case of *Sio Koon Lin & Anor v SB Mehra*[3] the respondent there had contributed $100,000 to a partnership business with the appellant. Subsequently it was mutually agreed, inter alia, that the respondent would assign all his rights in the partnership to the first appellant in consideration of the return of the capital contribution $100,000. A sum of $15,000 was paid on the execution leaving $85,000 to be paid by monthly instalments of $10,000 on 12 of each succeeding month. There was no provision that in the event of default in the payment of any one

instalment, the remaining instalments could become immediately due and payable. On 7 October 1972 the respondent took out a writ claiming, inter alia, payment of the sum of $85,000 with interest. This writ was subsequently amended on 14 October 1972 and a new prayer was added for the payment of any sum found due on the taking of accounts. The learned trial judge gave judgment for the respondent and the appellants appealed to the Federal Court. In allowing the appeal Chang Min Tat FJ said at p 226:

> If as at 7 October, the respondent had no right of action to claim for the $35,000 it is clear that any amendment would be to introduce a new cause of action which did not exist at the date of the writ and if the leave of the court is necessary, it would be refused: *Eshelby v Federated European Bank (1)* [1932] 1 KB 254. But as noted, the amendment was made without any requirement for leave and before delivery of the statement of defence. A subsequent application by the appellants to strike out the amendment on the ground that no leave was given for it was, after argument in open court, dismissed. With this order of court, the pleadings must be read as amended. If the effect of the amendment was to determine the cause of action as at the date of the amendment, that is, on 14 October 1972, the respondent would be clearly entitled to $35,000 an instalment due and owing. And if not, but the cause of action was to be determined at the date of the writ, then he would not be. On the authority of *Sneade v Wotherton & Co* [1904] 1 KB 295 in which Collins MR held at p 297:
>
> > 'the writ as amended becomes the origin of the action and the claim thereon indorsed is substituted for the claim originally indorsed.'
>
> the amendment dated back to the date of the original issue of the writ and the action continued as though the amendment had been inserted from the beginning.
>
> It follows that the High Court erred in ruling that the respondent had on 7 October 1972 any cause of action in respect of the $85,000 or any part thereof. We come to this conclusion because authority compels us but with considerable sympathy for the respondent. What he should have done of course was to start another action or actions for the instalments as and when they fell due for payment but remain unpaid. This cannot now do since in the considerable time that had elapsed before the conclusion of the case was reached in the High Court, the claim of the respondent for the $85,000 which he had contributed from his own pocket is now statute-barred.

Counsel for the plaintiff drew my attention to the case of *Zea Star Shipping Co v Parley Augustsson*.[4] There the only question posed to the Admiralty Court of the Queen's Bench Division was whether the statement of claim could be amended so as to include a cause of action which had not accrued to the plaintiff on the date when the writ was issued. In giving an affirmative answer to the question the learned trial judge of the Admiralty Court did not say that the 'relation back' theory as laid down in *Tottenham Local Board of Health v Lea Conservancy Board*[5] and followed by the *Eshelby* case[1] was wrong. Indeed the learned trial judge (at p 607) conceded that:

> There will be many cases in which it would be inappropriate to give leave to amend a writ or a statement of claim by addition of a new cause of action because of the prejudice which would thereby be caused to the defendant.

However he chose to base his decision purely on procedural grounds and common sense. Thus he said at pp 607-608:

A I can find nothing in the Rules of Supreme Court which prevents me from giving effect to which I regard as the common sense of the matter.

In any event the judgment in the *Zea Star* case[4] is not binding on me and is contrary to the principle laid down by our then Federal Court in the *Sio Koon Lin* case[3] which I am bound to follow.

B Applying the principle of 'relating back' as enunciated by the cases I cited above to the present case, there is no doubt in my mind that the plaintiff is not entitled to claim the additional sum of $173,659.25 which became due and payable to the plaintiff only after the date of the issue of the writ and statement of claim. Bearing in mind that the plaintiff was entitled to be paid within 14 days of the receipt by the defendant of any certificate C from the architect pursuant to cl 11(b) of the sub-contract and that the certificates Nos ST10 and ST11 certifying payment of the additional work were issued by the architect on 20 July 1987 and 8 September 1987 respectively, I have no doubt that the cause of action in respect of the claim for the additional sum accrued to the plaintiff after the issue of the writ and D statement of claim on 18 February 1987.

In arriving at the aforesaid conclusion I have not overlooked the fact that the architect had issued what he called as a statement of final account on 30 October 1986. (See exh 'NME-3' annexed to the affidavit of Ng Mong Eng, the general manager of the plaintiff, affirmed on 14 July 1987.) At first glance this statement might appear to be a certificate issued by the architect E pursuant to cl 11(g) of the sub-contract the provisions of which I have reproduced above. Upon careful scrutiny of the provisions of the said cl 11(g) I am not satisfied that the said statement could be accepted as such a certificate under the said clause because in order to be such a certificate the architect must certify the amount of the final payment due to the F plaintiff and not just a final adjusted contract sum. Furthermore in order to qualify for payment under a final payment certificate under the said cl 11(g) the plaintiff must give an undertaking of indemnity and security against all latent defects in the sub-contract works and there is no evidence that the plaintiff in the present case had given any such undertaking.

The matter, however, does not end here for notwithstanding my finding G that the plaintiff is not entitled to claim for the additional sum of $173,659.25 for the reasons as stated above, the next question that follows is whether it is entitled to the sum of $48,618 which was the sum originally claimed by the plaintiff pursuant to O 14 of the RHC. Although counsel acting for the respective parties did not in their submissions direct their minds to this H issue, nevertheless, upon a casual reading of the allegations and counter-allegations contained in the respective affidavits of the representatives of the parties the claim for the sum of $48,618 is vehemently contested. I cannot ignore this highly contested issue.

According to Edward Lee, the contracts manager of the defendant, the amount in dispute was no doubt $48,618.40 but the defendant had a claim I against the plaintiff for:

(a) debit note No 06022/85 dated 24 June 1985 amounting to $2,500;
(b) debit note No 08014/85 dated 23 August 1985 amounting to another sum of $2,500;

(c) a debit note dated 31 March 1986 amounting to $43,618.40 being reimbursement for loss and expense due to delay caused by the defendant from 25 August 1985 to 29 January 1986 (see exhs 'LHS2', 'LHS3', 'LHS4' and 'LHS5' annexed to the affidavit of Edward Lee affirmed on 5 October 1987, encl 7).

In the further affidavit of the same Edward Lee affirmed on 10 January 1989 (encl 13) it was further asserted that it was only on 29 July 1987 that the plaintiff made good the defects outstanding and the final payment certificate and debit note showed that the defendant had a further claim in the sum of $28,624.40 against the plaintiff — see exh 'LHS-13' annexed to encl 13. The defendant had still a further claim for the sum of $125,029.28 in respect of power consumed by the plaintiff whilst testing and commissioning of the plaintiff's air-conditioning and ventilation works since the charges for testing and commissioning were at all material times to the account of the plaintiff. The right of the defendant to all the afore-mentioned claims is reserved under cl 3 (b)(i), (ii) and (iii) of the sub-contract which reads:

> The sub-contractor shall:
>
> ...
>
> (b) indemnify and save harmless the contractor against item
>
> (i) any breach, non-observance or non-performance by the sub-contractor, his servants or agents of the said provisions of the main contract; and
>
> (ii) any act or omission of the sub-contractor his servants or agents which involves the contractor in any liability to the employer under the main contract; and
>
> (iii) any claim, damage, loss or expenditure due to or resulting from any negligence or breach of duty on the part of the sub-contractor his servants or agents (including any wrongful user by him or them of scaffolding referred to in cl 18 of this sub-contract or other property belonging to or provided by the contractor).

The right of the defendant to claim for losses suffered by it in respect of defective sub-contract works is also reserved under cl 9(b) of the sub-contract. The right of a main contractor to withhold a certain sum to satisfy the main contractor's claim against the sub-contractor is also acknowledged under the common law — see for example *Gilbert-Ash (Northern) v Modern Engineering.*[6]

In answer to the defendant's contention Ng Mong Eng, the general manager of the plaintiff, affirmed an affidavit on 21 June 1989 (encl 14) in which he produced a letter dated 15 January 1987 written by the defendant's project manager in which was listed the defective works which the plaintiff had to rectify. And in answer to the defendant's claim for a sum of $125,029.28 in respect of power consumed by the plaintiff, the answer was that the matter was in no way involved with nor could it be raised in the present action of the plaintiff. At any rate the plaintiff went on to say that the claim in respect of the power consumed by the plaintiff was arbitrarily raised by the defendant in order to avoid liability. To my view the answers

given by the plaintiff only go to show that the defendant has succeeded in raising triable issues which cannot be resolved at the O 14 judgment stage. The issues can only be resolved at the trial of this action. Accordingly I hold that the plaintiff is also not entitled to summary judgment for the sum of $48,618. The appeal of the defendant is allowed and the order of the senior assistant registrar dated 7 August 1989 is revoked. The plaintiff is to pay the cost of the proceedings.

Appeal allowed.

Reported by Kevin Mathews

Chin Sin Motor Works Sdn Bhd & Anor v Arosa Development Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S7-22-536-90
LIM BENG CHOON J
16 OCTOBER 1991

***Tort** — Negligence — Sale of land — Sale and purchase agreement — Stage completion certificates issued by vendor's architect pursuant to agreement — Whether negligently given — Whether architect owes a duty of care to the purchaser*

In this action the first plaintiff purchased a piece of land from the first defendant who also agreed to construct a building thereon for the purchase price of $460,000. The first plaintiff entered into a loan agreement with the second plaintiff who was to make progress payments towards the purchase price. After filing their writ and statement of claim, the plaintiffs applied under O 14 r 1 of the Rules of the High Court 1980 for leave to enter interlocutory judgment against both the first defendant and the second defendant, who was the architect of the first defendant, in respect of the construction of the building. This application was dismissed by the senior assistant registrar ('SAR') on 30 March 1991. The plaintiffs appealed to the High Court. At the appeal hearing on 25 July 1991 the plaintiffs confined submissions against the decision of the SAR in respect of the second defendant and abandoned the appeal against the decision of the SAR against the first defendant.

By a written sale and purchase agreement dated 1 April 1985 made between the first plaintiff and the first defendant ('the agreement'), the first defendant agreed to sell and the first plaintiff agreed to purchase a piece of land with a building to be erected upon by the first defendant. By cl 4(1) of the agreement the purchase price was to be paid to the first defendant by instalments progressively according to the stages of completion of the building set out in the Third Schedule of the agreement. By item (3) of the Third Schedule, an instalment in

the sum of $69,000 would become due and payable to the first defendant upon handing over vacant possession of the land and building with connection of water and electricity supply. By item (4) of the Third Schedule, a final instalment of $23,000 would be due and payable to the first defendant but was to be held by the first defendant's stakeholders and payments thereof to be made in two instalments, that is to say a sum of $11,500 upon the expiry of six months and the balance of $11,500 at the expiry of 12 months after the handing over of vacant possession. It was the second defendant's duty, as the architect, under the sale and purchase agreement to certify each stage of completion of the building which certification would be relied on by the first plaintiff and/or its financier, the second plaintiff, for the purposes of making instalment payments to the first defendant of the purchase price. On 22 December 1986, the second defendant certified in writing that the building had been completed to the stage of handing over of vacant possession and connection of water and electricity supply. By a letter dated 24 December 1986 the first defendant submitted to the second plaintiff the certificate of the second defendant notifying the second plaintiff that the sums of $69,000 and $23,00 had become due and payable by the first plaintiff to the first defendant and its solicitors accordingly. On 13 January 1987, in reliance thereof, the second plaintiff, on behalf of the first plaintiff, paid the said sums to the first defendant and its solicitors. It was asserted that in fact electricity supply was connected to the building thereby enabling the first defendant to deliver vacant possession of the building to the first plaintiff only 7 March 1990 and the certification of the second defendant and the notification of the first defendant was false and misleading.

Held, allowing the plaintiffs' appeal:

(1) There is no doubt at all that the second defendant is guilty of negligence and/or misrepresentation. First, there is no denial that the second defendant certified final payments of the two sums of $69,000 and $23,000 on 22 December 1986. Secondly, there is equally no denial that the second plaintiff, as financier of the first plaintiff relying on the certification of the second defendant, made payments of the two sums to the first defendant on 13 February 1987. Thirdly, it is again indisputable that the application for electricity supply would only be made to LLN when the first defendant sent the relevant forms to the first plaintiff on 16 November 1989 and it was only on 14 February 1990 that vacant possession was ready to be handed over by the first defendant with water and electricity supply. Thus, the electrical works were not completed or satisfactorily completed in 1986 when the second defendant issued its certificate on 22 December 1986.

(2) It is clear that the second defendant whose duty was to issue a certificate of final payment when the vacant possession of the house was ready to be delivered complete with all electrical works to receive electricity supply from LLN must surely owe a duty of

care to the plaintiffs when he knew or ought to have known that the plaintiffs would solely rely on its certification to make payments to the first defendant.

[Bahasa Malaysia summary

Di dalam tindakan ini, plaintiff pertama telah membeli sebidang tanah daripada defendan pertama yang juga bersetuju membina sebuah bangunan di atas tanah itu untuk harga $460,000. Plaintiff pertama telah memasuki satu persetujuan pinjaman dengan plaintif kedua yang dikehendaki membuat bayaran berperingkat harga pembelian itu. Setelah memfail writ dan penyata tuntutan mereka, plaintif telah memohon di bawah A 14 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk kebenaran memasukkan penghakiman interlokutori terhadap kedua-dua defendan pertama dan defendan kedua, yang merupakan arkitek defendan pertama, tentang pembinaan bangunan itu. Permohonan itu telah ditolak oleh penolong kanan pendaftar pada 30 Mac 1991. Plaintif telah merayu kepada Mahkamah Tinggi. Di pembicaraan rayuan itu pada 25 Julai 1991 plaintif telah menghadkan hujah mereka terhadap keputusan pendaftar tentang defendan kedua sahaja dan mengabaikan rayuan terhadap keputusan pendaftar tentang defendan pertama.

Melalui satu perjanjian jual-beli bertarikh 1 April 1985 yang dibuat antara defendan pertama dan plaintif pertama ('perjanjian itu'), defendan pertama bersetuju membeli sebidang tanah bersama sebuah bangunan yang akan dibina di atasnya oleh defendan pertama. Mengikut fasal 4(1) perjanjian itu, harga pembelian akan dibayar kepada defendan pertama secara ansuran mengikut peringkat penyempurnaan bangunan itu seperti yang dinyatakan di dalam Jadual Ketiga perjanjian itu. Mengikut butiran (3) Jadual Ketiga, satu bayaran ansuran sebanyak $69,000 harus dibayar kepada defendan pertama pada penyerahan pemilikan kosong tanah dan bangunan itu bersama sambungan bekalan air dan elektrik. Mengikut butiran (4) Jadual Ketiga, satu bayaran ansuran akhir sebanyak $23,000 harus dibayar kepada defendan pertama tetapi akan dipegang oleh 'stakeholder' defendan pertama dan bayaran akan dibuat dalam dua bayaran ansuran, iaitu $11,500 pada penghabisan enam bulan dan baki $11,500 pada penghabisan 12 bulan selepas penyerahan pemilikan kosong. Adalah menjadi tugas defendan kedua, sebagai arkitek, di bawah perjanjian itu untuk mengesahkan setiap peringkat penyempurnaan bangunan itu dan plaintif pertama dan/atau pembiayanya, plaintif kedua, akan bergantung kepada pengesahan itu bagi tujuan membuat bayaran ansuran kepada defendan pertama untuk harga pembelian. Pada 22 Disember 1986, defendan kedua mengesahkan secara bertulis bahawa bangunan itu telah disempurnakan ke peringkat penyerahan pemilikan kosong bersama sambungan bekalan air dan elektrik. Melalui sepucuk surat bertarikh 24 Disember 1986, defendan pertama mengemukakan pengesahan defendan kedua kepada plaintif kedua dan memberitahu plaintif kedua bahawa jumlah $69,000 dan $23,000 harus dibayar

oleh plaintif pertama kepada defendan pertama dan peguamcaranya. Pada 13 Januari 1987, bergantung kepada pengesahan itu, plaintif kedua, bagi pihak plaintif pertama membayar jumlah tersebut kepada defendan pertama dan peguamcaranya. Telah didakwa bahawa sebenarnya bekalan elektrik telah disambung kepada bangunan itu, seterusnya membolehkan penyerahan pemilikan kosong oleh defendan pertama kepada plaintif pertama, cuma pada 7 Mac 1990. Jadi pengesahan defendan kedua itu dan pemberitahuan defendan pertama itu adalah palsu dan mengelirukan.

Diputuskan, membenarkan rayuan plaintif itu:

(1) Tidak ada keraguan langsung bahawa defendan kedua telah bersalah kerana kecuaian dan/atau salah nyataan. Pertama, tidak dapat dinafikan bahawa defendan kedua telah mengesahkan bayaran akhir dua jumlah $69,000 dan $23,000 itu pada 22 Disember 1986. Kedua, juga tidak dapat dinafikan bahawa plaintif kedua, sebagai pembiaya plaintif kedua dengan bergantung kepada pengesahan defendan kedua itu, telah membayar kedua-dua jumlah itu kepada defendan pertama pada 13 Februari 1987. Ketiga, sekali lagi tidak dapat dipertikaikan bahawa permohonan untuk bekalan elektrik hanya akan dibuat kepada LLN apabila defendan pertama menghantar borang yang berkenaan kepada plaintif pertama pada 16 November 1989 dan cuma pada 14 Februari 1990 sahajalah pemilikan kosong sedia untuk diserahkan oleh defendan pertama bersama bekalan air dan elektrik. Lantaran itu, kerja-kerja elektrik belum dihabiskan atau dihabiskan dengan sempurna dalam 1986 apabila defendan kedua mengeluarkan pengesahannya pada 22 Disember 1986.

(2) Adalah jelas bahawa defendan kedua yang mempunyai tugas untuk mengeluarkan sijil bayaran akhir apabila pemilikan kosong bangunan itu sedia untuk diserahkan lengkap dengan semua kerja-kerja elektrik untuk menerima bekalan elektrik daripada LLN tentulah mesti terhutang satu tugas bercermat kepada plaintif apabila beliau tahu atau patut tahu bahawa plaintif akan bergantung secara tunggal kepada pengesahannya untuk membuat bayaran kepada defendan pertama.]

[*Editorial Note*: The second defendant has appealed to the Supreme Court vide Civil Appeal No 03-107-1991.]

Cases referred to

1 *Grant v Australian Knitting Mills Ltd* [1936] AC 85 (refd)
2 *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465 (folld)
3 *Dutton v Bognor Regis Urban District Council* [1972] 1 QB 373; [1972] 1 All ER 462 (folld)

EH Lim (*Mah-Kok & Din*) for the plaintiffs.
Shafik Fauzan (*Mun & Co*) for the second defendant.

Cur Adv Vult

A **Lim Beng Choon J**: In this action the first plaintiff purchased a piece of land from the first defendant who also agreed to construct a building thereon for the purchase price of $460,000. The first plaintiff entered into a loan agreement with the second plaintiff who was to make progress payments towards the purchase price. After filing their writ and statement of claim the plaintiffs applied under O 14 r 1 of the Rules of the High Court 1980 for leave to enter interlocutory judgment against both the first defendant and the second defendant who was the architect of the first defendant in respect of the construction of the building. The application for summary interlocutory judgment of the plaintiff was dismissed by the senior assistant registrar ('SAR') on 30 March 1991. Being dissatisfied with the decision of the SAR the plaintiffs appealed to me on 1 April 1991. At the hearing before me on 25 July 1991 counsel for the plaintiffs confined his submission against the decision of the SAR in respect of the second defendant and abandoned the decision of the SAR against the first defendant. I allowed the appeal against the second defendant and directed that damages against the second defendant would be assessed by the court. The second defendant now appeals against my decision to the Supreme Court and I hereby give my grounds of judgment.

It is necessary at the outset to give a brief summary of the averments of the plaintiffs as appeared in their statement of claim. By a written sale and purchase agreement dated 1 April 1985 made between the first plaintiff and the first defendant ('the sale and purchase agreement'), the first defendant agreed to sell and the first plaintiff agreed to purchase a piece of land with a building to be erected thereon by the first defendant. By cl 4(1) of the said agreement the purchase price was to be paid to the first defendant by instalments progressively according to the stages of completion of the building set out in the Third Schedule of the said agreement. By item (3) of the Third Schedule, an instalment in the sum of $69,000 would become due and payable to the first defendant on the handing over of vacant possession of the land and building with connection of water and electricity supply to the said building. By item (4) of the Third Schedule a final instalment of $23,000 would be due and payable to the first defendant but which was to be held by the first defendant's solicitors as stakeholders and payments thereof to be made in two instalments, that is to say a sum of $11,500 upon the expiry of six months and the balance of $11,500 at the expiry of 12 months after the handing over of vacant possession. At all material times the second defendant was the architect for the first defendant and as such it was the second defendant's duty under the sale and purchase agreement to certify each stage of completion of the building for which certification would be relied upon by the first plaintiff and/or its financier, the second plaintiff, for the purposes of making instalment payments to the first defendant of the purchase price. The second defendant therefore owed a duty to the first plaintiff to ensure that its certification of each stage of completion of the building would be true and accurate. On 22 December 1986, the second defendant certified in writing that the building had been completed to the stage of handing over of vacant possession and connection of water and electricity supply to the building. By a letter dated 24 December 1986, the first defendant submitted to the second plaintiff the

certificate of the second defendant notifying the second plaintiff that the sums of $69,000 and $23,000 had become due and payable by the first plaintiff to the first defendant and its solicitors respectively. On 13 January 1987 in reliance of the first defendant's letter and the second defendant's certificate, the second plaintiff, on behalf of the first plaintiff, paid to the first defendant and its solicitors the said sums of $69,000 and $23,000 respectively. It was asserted that in fact electricity supply was connected to the building, thereby enabling the first defendant to deliver vacant possession of the building to the first plaintiff, only on 7 March 1990 and the certification of the second defendant and the notification of the first defendant were false and misleading. The first defendant had therefore received the said sums of $69,000 and $23,000 to the use of the first plaintiff over the period of 13 January 1987 to 7 March 1990. The second defendant was negligent in the certification and the plaintiffs gave particulars of the second defendant's negligence which were:

(1) certifying that the above-mentioned stage of completion had been reached when it was not true;
(2) failure to ascertain the actual stage of completion; and
(3) knew or ought to have known that the first plaintiff and/or its financiers would rely upon the certification to make instalment payments to the first defendant when it was not due and payable.

By reason of the matters aforesaid, the first plaintiff had sustained loss and damage. The first plaintiff therefore claimed against both the first and second defendants — (a) damages referred to in para 15 of the statement of claim; (b) interest thereon at such rate and period as the court deemed fit; and (c) costs.

It is to be noted that I only summarized the averments of the plaintiffs' statement of claim insofar as they are related to the claim of the plaintiffs against the second defendant. I have omitted most of the averments of the plaintiffs relating to their claim against the first defendant since at the hearing of the plaintiffs' appeal counsel for the plaintiff had, as stated earlier, confined himself in attacking the decision of the SAR insofar as it concerned the second defendant.

In its defence, the second defendant denied all the charges of negligence made against it and particularly averred that firstly the second defendant did not owe a duty of care to the plaintiffs. Secondly in any event at the time of issuing of its certificate of payment all the connections for the supply of electricity and water were completed. It was through the first plaintiff's unwillingness and/or negligence in failing to pay the necessary deposits to the authorities concerned that they would not supply electricity and water to the building. The second defendant also denied that the first plaintiff suffered any losses or damages and put the first plaintiff to strict proof of the same.

In its affidavit in support of its application for summary interlocutory judgment the director of the first plaintiff, Low Hup Seng, affirmed the said affidavit on 4 October 1990 in which the following relevant documents were annexed thereto as:

Exh 'LHS1': the sale and purchase agreement executed between the first defendant and the first plaintiff on 15 April 1985.

Exh 'LHS2': the certification of the second defendant dated 22 December 1986 in which it was stated:

> This is to certify that the 3½ storey shophouse on Lots SH-1 to SH-24 Taman Putra Sulaiman — 1B have been completed up to the stage of:
>
> Handing over of vacant possession and connection of water and electricity supply to the building ... 15%.
>
> To be held by vendor's solicitors as stakeholders ... 5%.
>
> Signed
>
> Wong Kin Men Associates,
> Chartered Architects
> Room 4.107-4.109
> 4th Floor Wisma Central
> Jalan Ampang
> 50450 Kuala Lumpur

Exh 'LHS3': the first defendant's notice to the second plaintiff dated 24 December 1986 forwarding the second defendant's certificate of payment of —

(i) Handing over of vacant possession & connection of water & electricity supply to the building	15%	$69,000
(ii) To stakeholders: M/s Syed Alwi, Ng & Teoh	5%	$23,000
		$92,000

Exh 'LHS6': letter from the first plaintiff's solicitors to the second defendant dated 26 May 1990 which contained the following pertinent passages:

> 3 We are instructed that the said certification was a misrepresentation and erroneous as the electricity supply was connected to our client's property which is Lot SH-19 only 7 March 1990.
>
> 4 By reason of the above our client has been caused to pay unnecessary interest amounting to $30,901.28 for the loan of the abovesaid sums of $69,000 and $23,000 over the period of 13 January 1990 1987 [sic] to 7 March 1990.
>
> 5 Our further instructions are to demand from you which we hereby do that you compensate our client for the incurrence of the interest aforesaid. Take notice that unless the said sum of $30,901.28 and a further sum of $150 being our solicitors cost for this letter is paid to us as solicitors within seven days from the date hereof our instructions are to commence legal proceedings against you for the recovery thereof and further interest and costs.

In the affidavit, it was stated that:

> the defendants are and were justly and truly liable to the first plaintiff for damages together thereon. As a result of certain payments made to the first defendant pursuant to a certificate issued by the second defendant

and

> ... there is no defence to this action except for the amount of damages as regards the first plaintiff's claim for damages against both defendants.

Another affidavit was affirmed by Low Hup Seng on behalf of the first plaintiff on 8 November 1990 (encl 9) in which it was stated:

> 3 As further evidence that electricity supply was not connected right up to at least 16 December 1989 (if not later) now produced and shown to me marked accordingly are copies of the following documents:
>
> 3.1 'LHS-7': letter dated 18 October from Biro Pengaduan Awam, Jabatan Perdana Menteri;
>
> 3.2 'LHS-8': letter dated 15 November 1989 from the first defendant enclosing LLN forms for completion before electricity supply would be connected;
>
> 3.3 'LHS-9': letter dated 16 November 1989 from the first plaintiff to the first defendant (returning the LLN forms duly signed and chopped with a reminder that electricity deposit of $1,180 had been posted to the first defendant on 14 November 1989).
>
> 4 As pleaded in para 12 of the statement of claim, vacant possession was delivered by the first defendant to me on 7 March 1990. Now produced and shown to me marked 'LHS-10' is a true copy of a letter dated 14 February 1990 from the first defendant to the first plaintiff requesting the first plaintiff to take delivery of vacant possession. Now produced and shown to me marked 'LHS-11' is a true copy of the document dated 7 March 1990. I signed acknowledging receipt of the keys to the house and of taking possession (words in parenthesis supplied).

The first defendant through its chairman Lin Kim Hock affirmed an affidavit-in-reply dated 13 December 1990 in which it was stated, inter alia, that as the first defendant had obtained an order in Civil Suit D1-24-281-84 approving a composite scheme of arrangement proposed to be made between 'the applicants (which included the first defendant), their creditors and the holders of the scheme shares', the plaintiffs could not now proceed with their action against the first defendant.

The second defendant through its chairman, Wong Kin Men, affirmed an affidavit dated 19 December 1990 (encl 12) in which it was stated firstly that pursuant to cl 15(1) and (2) of the sale and purchase agreement it was the responsibility of the first defendant as vendor to cause to be laid all necessary water, electricity and sewerage mains to the building at its own costs, and the first plaintiff as purchaser was liable to pay for the deposits of installation of water and electricity meters. The delay in handing over vacant possession of the land and building was not due to the negligence of the second defendant as it had duly checked and was satisfied that the project was completed when it issued the certification on 18 December 1986. The second defendant could not be asked to bear the burden of ensuring that the first defendant's responsibility of applying to the appropriate authority for the electricity supply was discharged. From the documents produced by the first plaintiff annexed to the affidavits of Low Hup Seng it clearly showed that it was due to the failure on the part of the first defendant to deliver vacant possession on time and not in any way due to the fault of the second defendant.

A In his submission, counsel for the second defendant submitted that the pleadings of the plaintiffs created some confusion, in particular para 15 of the statement of claim in which the plaintiffs averred that the first plaintiff had suffered loss and damage and gave particulars of the said loss and damage. According to counsel, the pleading in the said para 15 was bad B pleading because the second defendant could not be expected to know the claim against him and this would prejudice the second defendant. It is to be noted that counsel had not said a single word regarding the question of liability on the part of the second defendant.

From the pleadings of the respective parties and the affidavit evidence adduced, I have no doubt at all that the second defendant is guilty of C negligence and/or misrepresentation and I say so for these reasons. There is firstly no denial that the second defendant certified final payments of the two sums of $69,000 and $23,000 on 22 December 1986. Under the Third Schedule of the sale and purchase agreement items 3 and 4, payments for the two sums were due only 'on handing over of vacant possession and *connection of water and electricity*'. Pursuant to cl 4(11) of the sale and D purchase agreement the balance of the purchase price would have to be paid 'by instalments and at the time and in the manner as prescribed in the Third Schedule thereto' and under sub-cl (2) of that clause it was stated:

> Every notice referred to in the Third Schedule requesting for payment shall be supported by a certificate under *the hand of the vendor's architect* and every such E certificate so signed *shall be proof of the fact that the works therein referred to have been completed.* (Emphasis supplied.)

Secondly there is equally no denial that the second plaintiff, as financier of the first plaintiff relying on the certification of the second defendant, made payments of the said two sums to the first defendant on 13 February 1987. F Thirdly it is again indisputable that application for electricity supply could only be made to LLN when the first defendant sent the relevant forms to the first plaintiff on 16 November 1989 and it was only on 14 February 1990 that the first defendant was ready to hand over vacant possession of the building with water and electricity supply. Bearing in mind that had all G the electrical works been ready to receive electricity from the main supply of LLN it would be a simple matter of filling some forms and payment of a deposit whereupon LLN would take the necessary steps to supply electricity to the building. The fact that an application for electricity could only be made to LLN on or about 16 November 1989 must, on the balance of probabilities, show that the electrical works had not been completed or H satisfactorily completed when the second defendant issued its certificate on 22 December 1986. Had the electrical works been completed or satisfactorily completed on the date of the second defendant's certification, it is highly incredible that the first defendant would have waited for nearly three years before requesting the first plaintiff to apply to LLN for electricity I supply. There is no earthly reason for such a long delay had the electrical works been completed or satisfactorily completed in 1986. The one and only conclusion that I can arrive at is that the electrical works were not completed or satisfactorily completed in 1986 when the second defendant issued its certification on 22 December 1986. I reiterate that the second defendant is guilty of negligence and/or misrepresentation which caused the

first plaintiff to suffer loss or damage in that it had to pay interests to the second plaintiff for the premature release of the said two sums of money. A

Notwithstanding the above finding, it is still necessary to consider whether the second defendant owed the plaintiffs a duty of care for 'no case of actionable negligence will arise unless the duty to be careful exists' (per Lord Wright in *Grant v Australian Knitting Mills Ltd*[1] at p 103). The recognition of liability for careless misstatements is settled by the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners*.[2] The principle is that there is a duty situation whenever 'the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him'. This principle is advanced further in *Dutton v Bognor Regis Urban District Council*.[3] There a builder, X, had started to build a house on land belonging to him and on the site of an old rubbish tip, which had been filled in. The foundations were not strong enough to support the kind of house that was being built on such insecure soil. An inspector of the defendant council negligently failed to discover that the foundations were inadequate and in consequence approval was given to X to proceed with the house. X did so and eventually sold the house to a purchaser, who later sold it to the plaintiff. Serious structural defects soon began to appear as the house subsided. The plaintiff sued the defendants who were held liable. A point that emerges from this case is that it is not even essential to show that the plaintiff relied on the defendant's statement in buying the house. The liability of the defendant is established once it is found that they owe a duty of care in giving the approval to proceed with the building to the purchaser of the house. B C D E

Applying the principles laid down in the aforecited cases to the present case, it is clear that the second defendant whose duty was to issue a certificate of final payments when the vacant possession of the house was ready to be delivered complete with all electrical works to receive electricity supply from LLN must surely owe a duty of care to the plaintiffs when he knew or ought to have known that the plaintiffs would solely rely on its certification to make payments to the first defendant. F G

Finally as regards the pleadings in the statement of claim there is no doubt that the plaintiffs were claiming against both the defendants for loss or damage suffered by the first plaintiff due to the premature payments which caused them to have to pay extra interests to their financier, the second plaintiff, in the sum of $30,901.28 for the period from 13 January 1987 to 7 March 1990. This claim was clearly pleaded in paras 14 and 15 of the statement of claim. H

On the grounds as stated above, I therefore allowed the appeal of the first plaintiff against the second defendant and directed that damages be assessed by the court.

Appeal allowed. I

Reported by Kevin Mathews